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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/725,610

12/02/2003

Kenneth A. Martin

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05/26/2006

BUSKOP LAW GROUP, P.C.
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EXAMINER

LEITH, PATRICIA A

ART UNIT

PAPER NUMBER

1655

DATE MAILED: 05/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/725,610

Applicant(s)

MARTIN ET AL.

Examiner

Patricia Leith

Art Unit

1655

– The MAILING DATE of this communication appears on the cover sheet with the correspondence address –
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 March 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claims 1-37 are pending in the application and were examined on their merits.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a previous Office Action.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-37 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-16 of U.S. Patent No. 6, 900, 173 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of '173 'make obvious' claims 1-37 for the following reason: Claims 1-16 of '173 teach all of the components of the Instantly claimed invention however is silent to the liquid component.

Vitamin supplements were well known in the art to be taken with water and mixed with water in order to ease delivery of the vitamins.

One of ordinary skill in the art would have been motivated to take the vitamin supplement of '173 in order to ease delivery of the vitamin. This would have been particularly advantageous to those who have trouble swallowing tablets and pills. Further, the ordinary artisan would have recognized that a known vitamin supplement could have been manufactured in various forms, including a liquid beverage in order create a product which was more marketable to consumers who have trouble swallowing pills/tablets.

Claim Rejections - 35 USC § 103

Claims 1- 6, 8-25 and 27-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lumpur, K (2001).

Applicant's arguments were fully considered, but not found persuasive.

Applicant argues that "The article Lumpur, K does not accurately reflect the ideas or products that Tishcon sells or manufactures...Nowhere in this website, nor through a conversation with Tishcon representatives could a beverage made by Tishcon be ascertained" (p. 9, Arguments). However, the article did disclose a drink containing the constituents keenly pointed out in the previous Office Action. Thus, the reference makes obvious the claimed invention. The evidence provided by Applicant in the

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Affidavit filed 3/17/06 does not negate the article and does not provide ample evidence that the product was not on sale.

Applicant argues that 'It does not deal itself with tablets, softgels, hard gelatin capsules and powders. Therefore it would not have been obvious for a person having ordinary skill in the art to manufacture a perioperative multivitamin protein beverage and additive for use in preparing an individual for fast surgical recovery" (p. 9, Arguments). However, the Examiner respectfully disagrees. It is clear from the reference that the supplement was in drink form and thus contained an ingestible liquid. The only difference between Lumpur and the claimed invention is that Lumpur did not disclose the amounts of constituents in the nutritional drink. One of ordinary skill in the art would have readily recognized that the amounts ingredients contained within nutritional supplements are routinely varied in order to meet the demands of the consumer; such as extra strength or regular strength for example. Manufacturing different forms of the vitamin complex would have been advantageous in order to give consumers a choice of carrier for the already known vitamin complex.

Claims 7 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lumpur, K (2001) as applied to claims 1- 6, 8-25 and 27-37 above, and further in view of Bell et al. (US 5968896 A).

Applicant argues that "It would not have been *prima facie* obvious for Bell et al. to be combined with Lumpur, K" because Lumpur, K discloses tablets and powders for example, and Bell deals with nutritional bars/breads/cakes ect."(pp. 9-10, Arguments). In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, one of ordinary skill in the art would have had a reasonable expectation that the addition of the vitamin complex of Lumpur, K into an edible carrier such as a nutritional bar would have provided someone with the same nutrition as the vitamin composition disclosed by Lumpur, K except in a different appealing package.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

No Claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia Leith whose telephone number is (571) 272-0968. The examiner can normally be reached on Monday - Thursday 8:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Patricia Leith
Primary Examiner
Art Unit 1655

May 17, 2006

A handwritten signature in black ink, appearing to read 'Patricia Leith', with a large, stylized initial 'P'.